IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 205 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

HOTEL SABAR PVT.LTD.

Appearance:

1. INCOME TAX REFERENCE No. 205 of 1989
MR MANISH R BHATT for Petitioner No. 1
MR TANVISH U BHATT for Petitioner No. 1
MR JP SHAH and MR. MANISH J. SHAH for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 16/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

The Income-tax Appellate Tribunal has referred the following questions at the instance of the High Court under Section 256(2) of the Income-tax Act, 1961.

"1. Whether the Appellate Tribunal is right in law and on facts in deleting the penalty imposed by the I.T.O. under Section 271(1)(c) of the I.T. Act, 1961 and confirmed by the CIT in Appeals?

2. Whether, the facts circumstances and legal provisions, do not justify the imposition of the penalty under Section 271(1)(c) of the I.T. Act, 1961?

3. When, a clear case was made out by the Income-tax Officer that the assessee had furnished inaccurate particulars of income and he imposed a penalty of Rs. 1,60,000/- with the approval of IAC and when the C.I.T. (Appeals) had declined to interfere with the decision of the ITO, the Appellate Tribunal was justified in law in deleting the penalty?

4. Whether the finding of the Tribunal that penalty under Section 271(1)(c) of the I.T. Act, 1961 is not justified, is correct in law and outstainable from material on record?"

2. The relevant assessment year was 1975-76 for which return of income was filed on 31.7.1975 by the assessee declaring a loss of Rs 1,69,485/- which in the revised return was reduced to Rs. 1,57,612/-.

3. The assessee is a Private Limited Company which joined as a partner with M/s. Ajay Estate Agency. At that time it was owning a building which was used by M/s. Hotel Sabar which was a registered firm. There was a dining hall and a guest house in the building. Later on, the assessee which had become partner with 25% share took over the business of Hotel Sabar and the land and building of M/s. Ajay Estate Agency. The assessee took over the land and building for Rs. 16,50,000/- from M/s. Ajay Estate Agency and furniture, fixtures and utensils from Hotel Sabar at double their value of Written Down Value. In its return of income the assessee claimed depreciation of Rs. 2,37,852/- on the assets acquired by it from the aforesaid firms. The ITO inquired from the assessee as to how the value of Rs. 16,50,000/- was

fixed for land and building and how the price was fixed for movables acquired by the assessee from the outgoing firms which were the partners. It was stated by the assessee before the ITO that the price of the land and building was arrived at on the basis of the Valuer's Report as per which the structure was valued at Rs. 4.62 lakhs and land at Rs. 10,68,900/-. As regards movables the assessee stated before the ITO that the value was fixed by mutual consent between the assessee and the retiring partners. The ITO held that cost of the assets shown by the assessee was not acceptable and the assessee was not entitled to claim any depreciation on the land. The ITO allowed depreciation on the building which was valued at Rs. 4.62 lakhs and also depreciation on movables on the basis of the Written Down Value of the articles. Depreciation of Rs. 86,380/- as against claim of Rs. 2,37,852/- was allowed and proceedings under Section 271(1)(c) of the I.T. Act were initiated. The Commissioner of Income-tax (Appeals) upheld the ITO's order in restricting the claim for depreciation and the Tribunal also upheld the order of the Commissioner of Income-tax (Appeals).

4. In the penalty proceedings the assessee contended that total income stood at Rs. 24,497/- and therefore penalty proceedings should be dropped. The ITO held that the value at which furniture and other items were taken over was motivated with an ulterior object of benefiting the retiring partners and with a view to claim higher depreciation. Penalty of Rs. 1.6 lakhs was imposed by the ITO after obtaining the requisite approval of the IAC.

5. In the appeal filed by the assessee, the Commissioner of Income-tax (Appeals) dismissed the appeal of the assessee upholding the finding of the ITO that the assessee had furnished inaccurate particulars of income. In the appeal before the Tribunal, the Tribunal held that total income as a result of the order of the Commissioner of Income-tax stood at Rs. 24,407/- which included disallowance of Rs. 29,213/- and, therefore, for the purpose of Explanation to Section 271(1)(c) of the Act, the correct income worked out to a loss of Rs. 4,806/-. It was held that by reducing the claim for depreciation in the instant case, there was no loss to the revenue inasmuch as the effective income for the purpose of the said Explanation was determined at loss and therefore no tax liability was involved as a result of the claim put forward by the assessee. The Tribunal held that the burden placed on the assessee could be said to have been discharged and the Explanation had no application to the facts of the case. Since the assessee had shown the

value of building with land at Rs. 16,50,000/- while value of superstructure was shown at Rs. 4,62,000/- and land at Rs. 10,68,900/- on the basis of the Valuer's Report, even if the authority held that depreciation was admissible only on the value of the superstructure, it cannot be said that the assessee had furnished inaccurate particulars of income with a view to get any unfair advantage. As regards movables, it was held that the assessee was required to show in the return the actual cost of assets acquired for the purpose of depreciation and it was open for the ITO to substitute the amount which according to him was reasonable in lieu of the actual cost. Therefore, when the assessee had claimed depreciation on the basis of the actual cost, it could not be said to have furnished inaccurate particulars of income within the meaning of Section 271(1)(c) of the Act.

6. The learned counsel appearing for the Revenue contended that the amount shown as value for claiming depreciation on building was Rs. 16.50 lakhs and that included the value of the land and therefore an effort was made to avoid disallowance which amounted to furnishing of inaccurate particulars of income. He also argued that but for the collusion between the assessee and the other partners, the goods such as furnitures, fixtures, utensils etc. could not have been purchased at the double of the price of their original cost.

6.1 In support of his contention, the learned counsel relied on the decision of this Court in the case of GANESH TEXTILES VS. COMMISSIONER OF INCOME TAX reported in 253 ITR 216 where the assessee had concealed the particulars of its income by not revealing that the amount of interest paid to the so-called depositor was in fact interest paid to the partner and made an effort to avoid disallowance under Section 40(b) of the Act, and it was held that the Tribunal was justified in confirming the penalty imposed by the ITO under Section 271(1)(c) of the Act. A decision of this Court in the case of A.M. SHAH AND COMPANY VS. COMMISSIONER OF INCOME TAX reported in 238 ITR 414 was cited for the proposition that penalty proceedings can be initiated where the ITO or the Appellate Assistant Commissioner was satisfied in the course of any proceedings under the Act that there has been concealment of income. If he is satisfied as per clause (c) of Section 271(1) that any person has concealed the particulars of his income or has furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty the sum mentioned in sub-clause (iii) of clause (c). It was held that

penal provision would operate when there is a failure of duty to disclose fully and truly particulars of income.

7. In context of the claim for depreciation for building which was fixed at Rs. 16.50 lakhs it appears that during the enquiry by the ITO the assessee gave an explanation that he had put a claim on the basis of the Valuer's report. It appears that the Valuer's report was produced during proceedings as per which cost of the superstructure was shown at Rs. 4.62 lakhs and that of the land at Rs. 10,68,900/-. Therefore, the relevant particulars showing the value of the superstructure were placed by the assessee before the ITO during the enquiry itself. This aspect has weighed with the Tribunal when it holds that since the assessee furnished break up of the amount on the basis of the Valuer's report it cannot be said that the assessee has furnished inaccurate particulars of its income with a view to get any unfair advantage even though its claim for depreciation was not tenable and was rightly rejected. We do not find that the Tribunal has committed any error in reaching this finding.

8. On the aspect of claim of depreciation on the revaluation of movable assets, it appears that the revaluation is made on the basis of the price of the assets mutually agreed. It is not the case of the Revenue that the agreement was sham. It appears that the Written Down Value was also mentioned against each of the items . The assessee had revalued assets as mentioned in para 6 of the order of the Tribunal which shows the nature of the assets, the original price, Written Down Value and the value at which the movables were taken. When the Written Down Value was mentioned and there was no dispute about the correctness of the original price indicated, the ITO had sufficient material before him to decide whether to allow depreciation on the Written Down Value or to accept higher value paid for such used goods.

9. It would, thus, be seen that since the assessee had not claimed the entire sum of Rs. 16.50 lakhs for only the superstructure but had claimed it for building as well as land and given break up of the price of the superstructure and the land on the basis of the Valuer's report and as regards movables it had given particulars of the items, their original price and Written Down Value, it cannot be said that there was any concealment of material particulars from the ITO during the proceedings. The Tribunal was, therefore, right in deleting the penalty imposed on the assessee under Section 271(1)(c) of the Act. All the questions which

were called under Section 256(2) of the Act are, therefore, answered in the affirmative in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly with no order as to costs.

(R.K. ABICHANDANI, J)

(K.M. MEHTA, J)

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